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Nos. 94-1173 and 94-1213

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

STATE OF NEW YORK, *et al.*,
Petitioners,

MARYLAND PEOPLE'S COUNSEL, *et al.*,
Petitioners-Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents,

VOICE-TEL ENTERPRISES, INC., *et al.*,
Respondents-Intervenors.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS-INTERVENORS

MICHAEL K. KELLOGG *
KELLOGG, HUBER, HANSEN
& TODD
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005
(202) 326-7900
Counsel for
Respondents-Intervenors

* Counsel of Record

(Additional Counsel for
Respondents-Intervenors on inside front cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Federal Communications Commission may preempt state regulations to the degree necessary to keep such regulations from negating the Commission's exercise of its lawful authority over interstate communication services.

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BRIEF IN OPPOSITION FOR RESPONDENTS-INTERVENORS

The decision below is correct, and there is no conflict with any decision of this Court or of any other Court of Appeals. Accordingly, the petitions for a writ of certiorari should be denied.

STATEMENT

Since 1971, in a series of decisions known as the "Computer Inquiries," the Federal Communications Commission ("FCC" or "Commission") has been wrestling with the proper treatment of the intersection between telephones and computers. In 1980, the Commission decided to deregulate all computer-enhanced services,[1] but to permit AT&T—and later, the divested Bell Operating Companies ("BOCs")—to provide such services only through separate subsidiaries (with separate facilities, personnel, accounts, and corporate identity).[2] The Commission was concerned that AT&T, because it had a regulated monopoly over the means of transmitting enhanced services, would otherwise be in a position to dominate the provision of such services by discriminating against competing providers or by cross-subsidizing its own services (*i.e.*, shifting costs from the unregulated, enhanced services to the regulated, basic services).

In 1986, the Commission became concerned that this regime of strict structural separation was impeding the

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[1] Enhanced services combine communications transmission with computer processing applications that act on the format or content of transmitted information; provide subscribers with additional, different or restructured information; or allow subscriber interaction with stored data. *See* 47 C.F.R. § 64.702(a). Examples of enhanced services are voice mail, remote data processing, and interactive databases (such as on-line legal research services).

[2] Final Decision, *Amendment of Section 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 *("Computer II")*, *modified on recon.*, 84 F.C.C.2d 50 (1980), *further modified on recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190 (released May 4, 1984).

development not only of a vibrant interstate enhanced services marketplace but also of a more modern interstate telecommunications network. In its *Computer III* order, the Commission decided to replace structural separation with nonstructural safeguards that would protect ratepayers and competitors against any forms of discrimination or cross-subsidy while permitting the efficiency of structural integration. Report and Order, *Amendment of Section 64.702 of the Commission's Rules & Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1002 (1986) ("*Phase I Order*"), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further modified on recon.*, 3 FCC Rcd 1135 (1988). At the same time, the Commission sought to preempt any state regulation of enhanced services. *Phase I Order*, 104 F.C.C.2d at 1125-26. In particular, the Commission sought to bar states from imposing structural separation requirements on telephone carriers. Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3102 (1987).

In 1990, a divided panel of the Ninth Circuit vacated the *Computer III* orders and remanded the entire proceeding to the Commission. *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990). The Court concluded that the FCC had failed sufficiently to explain how certain nonstructural safeguards would guard against cross-subsidization by the BOCs. The Court also found that the FCC's preemption order was overbroad. "The FCC may not justify a preemption order," the Court stated, "merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* at 1242-43. Some enhanced services might be offered on a purely intrastate basis, the Court noted, and the FCC had not explained how structural separation of such

purely *intra*state enhanced services would interfere with a carrier's provision of *inter*state enhanced services. *Id.* at 1244.

In its 1991 *Computer III Remand Order*, Pet. App. A34-A154, the Commission reaffirmed its elimination of structural separation, but adopted a much narrower, and more carefully crafted preemption order. The states may order structural separation for "purely intrastate enhanced services," and may also require "a separate corporate entity with separate books of account for the intrastate portion of jurisdictionally mixed enhanced services." *Id.* at A134. But the states may not require separate facilities and personnel for "the intrastate portion of jurisdictionally mixed enhanced services" because such requirements would necessarily entail separation of facilities and personnel used to provide interstate services as well. "As a practical matter," the Commission explained, "state structural separation requirements will compel carriers to use structural separation for interstate services, and, therefore, will negate the federal policy [of permitting structural integration] for interstate enhanced services." *Id.* at A139.[3]

On appeal, the Ninth Circuit again remanded, for further explanation, the Commission's decision to eliminate structural separation for interstate enhanced services. *Id.* at A1-A33. The court upheld the preemption order, however. "The FCC has presented adequate record support," the court noted, for its conclusion that "it would not be economically or operationally feasible" for the BOCs to offer the interstate portion of jurisdictionally mixed services on an integrated basis "while maintaining separate facilities and personnel for the intrastate portion." *Id.* at A31-A32. As a consequence, if such state regulations were allowed to stand, "enhanced service providers would

[3] The Commission also preempted contrary state rules dealing with the use of customer information and the disclosure of network changes. *See* Pet. App. A140-A142.

separate their facilities for services that are offered both interstate and intrastate, thereby essentially negating the FCC's goal of allowing integrated provision of enhanced and basic services." *Id.* at A31. Under these circumstances, the Court concluded, where federal and state regulations cannot coexist, the state regulations must give way. *Id.* at A31 (citing *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986)).

On remand, the FCC issued a new Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, FCC No. 95-48, CC Dkt. No. 95-20 (released Feb. 21, 1995), in which it proposed to review the various non-structural safeguards against BOC access discrimination currently in place and to determine, more generally, "whether structural separation should be reimposed for some or all BOC enhanced services." *Id.* at 3.

ARGUMENT

The decision below involves a straightforward application of *Louisiana Public Service Commission v. FCC*, *supra*. In that case, the court drew a distinction between FCC regulations that tread unnecessarily upon the authority of the states to regulate purely intrastate communications and FCC action that preempts state regulations in circumstances "where it [i]s not possible to separate the interstate and the intrastate components of the asserted FCC regulation." 476 U.S. at 375 & n.4.

Here, the FCC concluded, and the court below agreed, that it is not possible to separate the interstate and the intrastate components of some aspects of the FCC's regulations governing the BOCs' enhanced services offerings. *See* Pet. App. A139, A31. Petitioners do not suggest that this Court should review that fact-bound determination. Nor do they challenge the FCC's general statutory authority to regulate the terms and conditions under which the BOCs may provide interstate enhanced services.

Petitioners' sole contention is that, where otherwise valid federal regulations of interstate communications cannot coexist with state regulations of intrastate communications, the federal regulations must give way unless the FCC is performing "an express statutory duty," such as setting tariffs, pursuant to Title II of the Communications Act.[4] New York Pet. 20. *See also* Cal. Pet. 12. Specifically, petitioners contend that FCC regulations passed pursuant to its general, Title I responsibilities[5] must give way before inconsistent state regulations because 47 U.S.C. § 152(b) reserves to the states authority to promulgate "regulations for or in connection with intrastate communication service by wire or radio of any carrier." That position—which amounts to inverse preemption of federal regulations by the states—is untenable.[6]

1. As this Court has recognized, Title I empowers the agency to take "all regulatory actions 'necessary to ensure achievement of [its] statutory responsibilities.'" *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)). Among these are the responsibilities to "make available, so far as possible, to all the people of the United States, a rapid, efficient nationwide and world-

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[4] Title II of the Act, 47 U.S.C. § 201 *et seq.*, authorizes the FCC to impose entry, exit, and tariff regulation on services (such as basic voice telephony) that are provided on a common carrier (as opposed to a private carriage) basis.

[5] Title I of the Act—which "confer[s] regulatory authority over 'all interstate . . . communication by wire or radio,'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (quoting 47 U.S.C. § 152)—gives the FCC jurisdiction over "those activities and forms of communication that are [not] specifically described by the Act's other provisions," such as Title II. *Id.* at 172.

[6] Even the initial premise of petitioners' argument is faulty since, in passing the regulations at issue here, the FCC was acting pursuant to *both* its Title I and its Title II authority. *See* Pet. App. A142.

wide communications service with adequate facilities at reasonable rates" and to "encourage the provision of new services and technologies to the public." 47 U.S.C. §§ 151, 157.

The Communications Act does not expressly discuss the affirmative scope of the FCC's preemption power. But this Court has held that where the FCC adopts a valid policy within its statutory authority—including its Title I authority—it has plenary power under the Supremacy Clause to "determine that its authority is exclusive" and to preempt "any state efforts to regulate in the forbidden area." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 698-700 (upholding FCC preemption, under Title I, of "any state regulation of the signals carried by cable system operators"); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1986) (upholding FCC preemption under Title III). Preemption power thus is an adjunct to any lawful exercise of the FCC's authority; it does not matter which title or titles of the Act create the responsibility being discharged by the agency.

2. Section 152(b), in carving out an area of state jurisdiction, makes no distinction between Title I regulation and Title II regulation. Section 152(b) states that "nothing in *this chapter*" gives the Commission jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." The words "this chapter" refer to Chapter 5 and embrace both subchapter I (Title I) and subchapter II (Title II) of Chapter 5. Both the general mandates of Title I and the more specific mandates of Title II, therefore, must be construed in light of Section 152(b).

That is precisely how the Court proceeded in *Louisiana*. Although 47 U.S.C. § 220, a Title II provi-

sion, granted the FCC explicit regulatory authority over depreciation, the Court concluded that that authority must be exercised consistent with Section 152(b)'s reservation of authority to the states. Thus, Section 220 did not grant the FCC authority to override state depreciation schedules for intrastate telephone facilities. 476 U.S. at 376-77.

The Court applied the same analysis to the more general mandate of Section 151, in Title I. The FCC had concluded that accelerated depreciation schedules would best serve its goal of modernizing the nation's communications system. But since it was possible—through what is known as the "jurisdictional separations" process—to have one set of rates for the depreciation of interstate plant and another set of rates for the depreciation of intrastate plant, the FCC was restricted by Section 152(b) to setting the rates for interstate plant. *Louisiana*, 476 U.S. at 375-76. "Because the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service," the Court explained, "it facilitates the creation or recognition of distinct spheres of regulation." *Id.* at 375. "[O]nce the correct allocation between interstate and intrastate use has been made," the Court concluded, "it is certainly possible to apply different rates and methods of depreciation." *Ibid.*

In a critical footnote, the Court then stated that the depreciation issue was "readily distinguishable from those [cases] in which FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." *Id.* at 375 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*"NCUC I"*); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*"NCUC*

II")).[7] Where it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation," 476 U.S. at 375 n.4, the inconsistent state regulations must fall under the general principle that "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Id.* at 369.[8]

Contrary to petitioners' assertion, therefore, the Court in *Louisiana* did not reject the FCC's Title I preemption authority. Rather, the Court made a careful analysis of the specific preemption order at issue. Because the Court concluded that it was feasible to have separate intrastate and interstate depreciation rates, it overturned the FCC's preemption order. But the clear implication of the decision is that, if such separation had not been possible, the preemption order would have been sustained.

3. The decision below carefully follows the distinction made in *Louisiana*. As the Ninth Circuit explained, "the only limitation on a state's authority over intrastate telephone service is 'when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication.'" Pet.

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[7] In *NCUC I* and *NCUC II*, the Fourth Circuit upheld an FCC order preempting states from adopting regulations that barred connection of noncarrier-provided customer premises equipment (such as a telephone handset) to the telephone network for use in intrastate communications. Because the same telephone is used for intrastate and interstate calls, a state decision to forbid the interconnection of non-telco-supplied equipment would necessarily negate the federal decision to permit it. In that circumstance, the Court of Appeals concluded, the contrary state regulations must give way. *See* 537 F.2d at 791-92.

[8] Petitioners claim that the "impossibility" exception established in footnote 4 of *Louisiana* applies only to Title II regulations, not to Title I's more general mandates. But footnote 4 is placed in a section discussing Title I, not Title II, and there is no reason—either in the opinion itself or in the general law of preemption—to believe this Court intended to limit its reach.

App. A29 (citing *California I* at 1243). The court stressed that this "impossibility exception is narrow, and that the FCC has the burden of showing that the state regulation would negate valid FCC regulatory goals." *Id.* at A29. The court below properly concluded that the FCC had met that burden here.

As the Commission itself explained, its preemption order is "as narrow as possible to accommodate differing state views while preserving federal goals." *Id.* at A132. The order permits states to apply "state structural separation requirements that apply to purely intrastate enhanced services, or that merely require a separate corporate entity with separate books of account for the intrastate portion of jurisdictionally mixed enhanced services." *Id.* at A134. But it draws the line at "state requirements for separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services" because such requirements would necessarily entail separation of facilities and personnel used to provide interstate services as well. *Ibid.* The Court of Appeals agreed. *See Id.* at A31 ("The FCC has presented adequate record support for its conclusion that because of economic and operational factors, enhanced service providers would separate their facilities for services that are offered both interstate and intrastate, thereby essentially negating the FCC's goal of allowing integrated provision of enhanced and basic services.") Under these circumstances, where federal and state regulations cannot coexist, the state regulations must give way.

4. Contrary to the claims of the State of California (Pet. 12-17), there is no split among the circuits on the question of the nature or extent of the FCC's preemptive authority under Title I. The decision below expressly follows, and is fully consistent with the decision of the Fourth Circuit in *NCUC I* and *NCUC II*. *See* n.7, *supra*. California mischaracterizes these cases by claiming that the states themselves were responsible for creating the

conflict with federal regulations by refusing to order separate telephones for intrastate calls. If the state had chosen "to force . . . customers to have two telephones, one for interstate use and one for intrastate use," California argues, "then it would not have been impossible for customers to comply with both federal and state regulations" and the FCC's preemption order would have been struck down. Cal. Pet. 13-14.

But the Fourth Circuit's decision turned on the intrinsic nature of the FCC's regulations, not on the vagaries of the states' response. The Court noted that "separation of terminal equipment used exclusively for local communication is a practical and economic impossibility," and that, in itself, was sufficient grounds to warrant FCC preemption. 552 F.2d at 1043. The same is true here: the use of separate facilities just for the intrastate portion of jurisdictionally mixed enhanced service is a practical and economic impossibility.

The decision below is also consistent with a number of decisions from the D.C. Circuit. In *Computer and Communications Industry Association v. FCC* ("CCIA"), 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), for example, the Court upheld the FCC's *Computer II* order—adopted under its Title I authority—which preempted states from tariffing customer premises equipment ("CPE") such as telephones. In doing so, the court directly considered whether the FCC could preempt under its Title I power. The court held that it could, stating that "we perceive no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary [that is, Title I] jurisdiction." *CCIA*, 693 F.2d at 217 (footnote omitted).

Since *Louisiana*, the D.C. Circuit has on three other occasions reaffirmed that the FCC may preempt state regulations under Title I. In *Illinois Bell Telephone Company v. FCC*, 883 F.2d 104 (D.C. Cir. 1989), that court upheld an FCC order—based expressly on Title I—that

preempted state regulation inconsistent with an FCC rule requiring the BOCs to pay commissions to noncarrier CPE vendors that market certain BOC services. Similarly, in *National Association of Regulatory Utility Commissioners v. FCC* (*"NARUC III"*), 880 F.2d 422 (D.C. Cir. 1989), the D.C. Circuit affirmed a portion of a Commission order—also based on the FCC's Title I powers—that preempted state tariff regulation of carrier-provided wiring on the customer's premises. And in *Public Service Commission v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990), the court affirmed the preemption of state regulation of the rates of "DNP," a BOC-provided billing and collection service subject to the FCC's Title I jurisdiction. In all three cases, the court expressly relied on this Court's *Louisiana* decision.

5. Finally, contrary to the suggestion of the State of New York, the decision below does not undermine the "dual regulatory system" and "leave the nation with a 'one fits all' agenda." N.Y. Pet. 26. As this Court noted in *Louisiana*, 476 U.S. at 360, "the realities of technology and economics belie . . . a clean parceling of responsibility" between state and federal authorities. On some matters, it will simply be "*not* possible to separate the interstate and the intrastate components." *Id.* at 375 n.4. And, on those matters, federal regulators must prevail. The alternative would be balkanization of the nation's telephone system and emasculation of the FCC's plenary, statutory authority over interstate communications.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL K. KELLOGG *
KELLOGG, HUBER, HANSEN & TODD
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005
(202) 326-7900
Counsel for Respondents-Intervenors

JAMES P. TUTHILL
JEFFREY THOMAS
140 New Montgomery Street
San Francisco, CA 94105
(415) 542-7661
Counsel for Pacific Bell and Nevada Bell

ROBERT M. LYNCH
RICHARD C. HARTGROVE
MICHAEL J. ZPEVAK
One Bell Center
Suite 3520
St. Louis, MO 63101
(314) 235-2507
Counsel for Southwestern Bell Telephone Company

ROBERT MCKENNA
1801 California Street
Suite 4700
Denver, CO 80202
(303) 672-2861
Counsel for U S West

MARY MCDERMOTT
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7247
Counsel for United States Telephone Association

* Counsel of Record

FRANK PANEK
2000 W. Ameritech
Hoffman Estates, IL 60196
(708) 248-6064
Counsel for Illinois, Indiana, Michigan, Ohio and Wisconsin Bell Telephone Companies

EDWARD D. YOUNG III
MICHAEL E. GLOVER
LAWRENCE W. KATZ
1320 N. Courthouse Road
Arlington, VA 22201
(703) 974-4862
Counsel for Bell Atlantic Telephone Companies

KIRVEN GILBERT
4300 Southern Bell Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375
(404) 614-4897
Counsel for BellSouth Corporation

EDWARD R. WHOLL
CARLOS J. SANDOVAL
120 Bloomingdale Road
White Plains, NY 10605
(914) 644-2030
Counsel for the New York and New England Telephone Companies

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